An underground way of access to adjacent coal is much more convenient for the coal owner and much less burdensome to the surface owner than a right of way over the surface and hence more beneficial to the public. It is quite possible for the grantor by express provision so to restrict the use of the haulways that only coal from the granted tract may be transported through them,[41] but no such intent should be presumed.[42]

W. R. V.

VALIDITY OF THE NINETEENTH AMENDMENT

The Supreme Court in *Leser v. Garnett* (1922) 42 Sup. Ct. 217, affirmed the decision of the Court of Appeals of Maryland sustaining the validity of the Nineteenth Amendment.[1] The opinion considers briefly and holds untenable the various objections raised. While there is no fault to find with the result of the decision—it could not indeed have been otherwise—some of the issues involved are of permanent interest and perhaps merit a somewhat fuller discussion than was given by the court.

The first contention, that "so great an addition to the electorate, if made without the state's consent, destroys its autonomy as a political body" and thus deprives the state of equal representation in the Senate, was disposed of by a reference to the Fifteenth Amendment. The court refused to entertain the suggested distinction that the Fifteenth Amendment, while not adopted in accordance with law, has been validated merely by acquiescence.[2]

The second contention, that the state Constitutions of Tennessee and Missouri[3] contain provisions limiting the power of the legislature to ratify, was disposed of in the same summary fashion.

"The function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal

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122 N. Y. 505, 25 N. E. 922; *McCracken v. Gumbert* (1890) 131 Pa. 36, 18 Atl. 1068; *St. Louis Trust Co. v. Galloway Coal Co.* (1913, C. C. A. 5th) 201 Fed. 1022.

[41] *Schobert v. Pittsburgh Coal & Min. Co., supra* note 17.

[42] *Pruett v. O'Gara Coal Co.* (1911) 165 Ill. App. 470. No easement of access through the surface will be implied when the coal owner has access by tunnel from adjacent land. *Friedline v. Hoffman* (1922, Pa.) 115 Atl. 845.

[1] (1921) 114 Atl. 840.

[2] See Machen, *Is the Fifteenth Amendment Void?* (1909) 23 HARV. L. REV. 169; Marbury, *The Limitations upon the Amending Power* (1919) 33 HARV. L. REV. 223; Frierson, *Amending the Constitution of the United States; A Reply to Mr. Marbury* (1920) 33 HARV. L. REV. 659.

[3] "No convention or general assembly of this state shall act upon any amendment of the Constitution of the United States proposed by Congress to the several states, unless such convention or general assembly shall have been elected after such amendment is submitted." Tenn. Const. 1870, art, 2, sec. 32. A similar provision is found in the Florida Constitution. 1885, art. 16, sec. 19. Florida

Constitution; and *it transcends any limitations sought to be imposed by the people of a state.*"[4]

But does this not disregard the important principle of the sovereignty of the people, upon which our government is based,[5] and is it not logically inconsistent with the principle that the state legislatures, being creatures of the state constitutions, must act in subordination thereto since they cannot be greater than their creators?[6] A decision of this point was unnecessary in the present case, as will hereafter appear, but in view of the fact that the question may arise again and be squarely presented for determination, it may not be inappropriate to suggest that the court's statement that *any* limitations sought to be imposed by the people of the state are void, is perhaps too broad. Is there, for example, any inconsistency in the federal requirement that ratification shall be by state legislatures, and the Tennessee requirement that ratification shall be, so far as Tennessee is concerned, by a legislature elected after the proposal of the amendment? It is regrettable that the court dismissed the contention so briefly, without examining the issues involved or giving some idea of the reasons upon which its conclusion was reached.

What part of their inherent sovereignty did the people of the states intend to part with under Article V of the Federal Constitution?[7] In the Ohio referendum case of *Hawke v. Smith* the court said:[8]

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did not act upon the Amendment. The Missouri Constitution provides that "the legislature is not authorized to adopt nor will the people of the state ever assent to any amendment or change of the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of the state." Mo. Const. 1875, art. 2, sec. 3.

[4] Citing *Hawke v. Smith*, No. 1 (1920) 253 U. S. 221, 40 Sup. Ct. 495; *Hawke v. Smith*, No. 2 (1920) 253 U. S. 231, 40 Sup. Ct. 498; *National Prohibition Cases* (1920) 253 U. S. 350, 386, 40 Sup. Ct. 486, 488. (Italics ours.) See also Dodd, *Amending the Constitution* (1920) 30 YALE LAW JOURNAL, 321, 344.

[5] "The fabric of American empire ought to rest in the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original foundation of all legitimate authority." Alexander Hamilton, THE FEDERALIST (1788) No. XXII. See also *McCulloch v. Maryland* (1819, U. S.) 4 Wheat. 316, 403. Likewise it is essential that the amendments to the Constitution rest on that same foundation. See *Dillon v. Gloss* (1921) 256 U. S. 368, 374, 41 Sup. Ct. 510, 512.

[6] Watson, *The Constitution* (1910) 1341.

[7] "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing Amendments which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided that no Amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

[8] (1920) 253 U. S. 221, 226, 40 Sup. Ct. 495, 497, reversing *Hawke v. Smith*

"The *method* of ratification is left to Congress. Both methods, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

And again:[9]

"Any other view might lead to endless confusion in the *manner* of ratification of federal amendments. The choice of the means of ratification was wisely withheld from conflicting action in the several states."

It seems to be recognized in that case that the purpose of Article V was to authorize Congress to assign the function of ratifying to state legislatures or conventions as it might see fit in order to bring about uniformity in the *mode of ratification* but not to take from the people their legitimate control over these agencies. It is quite true that a state legislature derives its power of ratification from the Federal Constitution, and thus is exercising a "federal function;" but it does not follow that the legislature is thereby invested with the sovereignty which is inherent in the people. When a legislature fails or refuses to consider a proposed amendment, the Federal Government has no ground for complaint. And if the people of the state, who are responsible for the existence of that legislature and whose will, as expressed in the state constitution, that legislature may not transcend, forbid it to act at all or authorize it to act only upon certain conditions, it is difficult to see upon what logical ground any validity can be given to a "ratification" in disregard of such commands.

That a state legislature, although acting in pursuance of an authority granted by the United States, cannot act in violation of the state constitution in which the limitations upon its powers are fixed, was recognized by the Supreme Court in the case of *Haire v. Rice*.[10] The court distinctly held that Congress, in designating a state legislature as an agency for carrying out a federal purpose, "intended such a legislature as would be established by the Constitution of the State, ... a legislature whose powers were certain to be limited by organic law . . . . a legislature as a parliamentary body, acting within its lawful powers, and

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(1919) 100 Ohio St. 385, 126 N. E. 400. (Italics ours.) The state court had held that the referendum was part of the state "legislature" and hence applicable to the federal amending process. See to the same effect *State v. Howell* (1919) 108 Wash. 340, 181 Pac. 920, holding that the word "legislature" refers to the legislative power of the state however expressed. The Supreme Court gave to the word "legislature" its ordinary meaning and properly held that since the Federal Constitution prescribes the method by which amendments shall be made, a state constitution cannot change that method. See also William H. Taft, *Can Ratification of an Amendment to the Constitution be Made to Depend Upon a Referendum?* (1920) 29 YALE LAW JOURNAL, 821.

[9] 253 U. S. 221, 230, 40 Sup. Ct. 495, 498. (Italics ours.)

[10] (1907) 204 U. S. 291, 27 Sup. Ct. 281.

by parliamentary methods." "It follows, therefore, that in executing the authority entrusted to it by Congress, the legislature must act in subordination to the state constitution."

It is a reasonable conclusion, then, that a state legislature, when designated by Congress as the agency for passing upon a proposed amendment, acts as the agent, not of the Federal Government, but of the people of the state, upon whose will depends its very existence; and that when such a body assumes to act in direct violation of the commands of the people, as expressed in the state constitution, its action has no more binding effect than that of any other body of individuals.[11] Any doubt that might arise from Article V of the Constitution would seem to be resolved by the Tenth Amendment which was subsequent in time and therefore controls. If all powers not already granted to the Federal Government are reserved "to the states respectively, or to the people," it is they and they alone who can grant new powers, although they permit Congress to select one of two specified agencies through which the grant is to be made, i. e., legislatures or conventions. If on the other hand these bodies, in considering new grants of powers to the Federal Government, act as agents of the Federal Government, free from state constitutional restraints, the Tenth Amendment is empty verbiage.

The third contention made in attacking the Nineteenth Amendment was "that the ratifying resolutions of Tennessee and of West Virginia are inoperative because adopted in violation of the rules of legislative procedure prevailing in the respective States."[12] The court seems to concede by silence the validity of this objection, and indeed, the case of

[11] The people of the United States by their Constitution might have conferred power upon any body of individuals to adopt an amendment on behalf of the inhabitants of Tennessee or Missouri. Such power could not subsequently be taken away by the people of one state. Did they in fact confer such power? The action of a state legislature in ratifying an amendment affects the jural relations of two groups of individuals: the inhabitants of the particular state and the inhabitants of the other states. It is not unreasonable to suppose that the power of a legislature to bind the two groups was intended to come from both groups by separate action. Thus, two parties may contract through a common agent; but he must have power to bind both in order to bind either, and this power must be conferred by each acting separately. So, the agency of a legislature to act on behalf of both the nation and the state may depend upon both the Federal Constitution and the State Constitution.

[12] Under the Rules of the Tennessee House a member voting in favor of a resolution may change his vote and move to reconsider. This has the effect of suspending the passage of the measure for two parliamentary days or until a new vote is taken. The vote in favor of the equal suffrage resolution was 50 to 46, but one of those voting affirmatively immediately made a motion to reconsider. For several days thereafter there was not a quorum, because of a filibuster. The filibusterers then returned, and with a quorum present the motion to reconsider was entertained and the suffrage resolution defeated. Meanwhile, however, the Governor of the State certified to the Secretary of State of the United States

Haire v. Rice[13] practically forces such a conclusion,[14] if such rules were actually violated. "But," said the court, "the question raised may have been rendered immaterial by the fact that since the proclamation the legislatures of two other states—Connecticut and Vermont—have adopted resolutions of ratification." A further and broader answer was also given. "As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."[15]

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that Tennessee had ratified, and the latter proclaimed the Nineteenth Amendment a part of the Constitution.

It has been said that this action of the Tennessee House upon the motion to reconsider was an attempt to "withdraw" the ratification of the amendment and was therefore a nullity. This contention is based upon the theory that since ratification of an amendment is a political and not a legislative act, the ordinary rules of procedure do not apply. If the ordinary parliamentary rules do apply, and this is a natural inference from the case of *Haire v. Rice, supra* note 10, there was no attempt to "withdraw" ratification for the obvious reason that there had been no ratification. The case is therefore essentially different from the action of Ohio and New Jersey in attempting to rescind their ratifications of the Fourteenth Amendment and of New York in attempting to rescind its ratification of the Fifteenth Amendment.

The West Virginia case involved much the same principle. One of the rules of the West Virginia Senate provides that after a measure is defeated and a motion to reconsider lost, it cannot be again considered at that session. The joint resolution to ratify the suffrage amendment was defeated in the Senate of that State and a motion to reconsider lost. But upon another vote subsequently taken in the same session the resolution was passed, the suffrage forces having been recruited to a sufficient strength by the addition of a senator who made a trip across the continent from California for the purpose. But see *infra* note 16 as to whether the rule involved was actually violated under these facts.

[13] *Supra* note 10.

[14] See Dodd, *Amending the Constitution* (1921) 30 YALE LAW JOURNAL, 321, 345. Mr. Dodd says that the state may "determine what shall be the organization of the State's representative legislative body, and what shall be the quorum for action by that body." He does not, however, believe that the state may "impose limitations upon the power to ratify." This distinction between (1) legislative organization and procedure, in connection with the ratification of a federal amendment, and (2) the competence of the state legislature to act upon a federal amendment, is a clear one. But it is difficult to perceive from Article V any intention in the people of the states to divest themselves of control over their legislatures in the one respect any more than in the other. Nor is *Hawke v. Smith* authority for such a view, since that case went simply upon the proposition that a state cannot change the *mode* of ratification provided in the Federal Constitution. That is to say, when Congress designates a state legislature as the proper agency, the state cannot designate a referendum. The two questions are obviously different.

[15] Citing *Field v. Clark* (1892) 143 U. S. 649, 669-673, 12 Sup. Ct. 495, 497-499. *Harwood v. Wentworth* (1896) 162 U. S. 547, 562, 16 Sup. Ct. 890, 893. See also 9 Ann. Cas 583, note; 23 L. R. A. 340, note; 40 L. R. A. (N. S.) 1, note. Dodd, *Amending the Constitution* (1921) 30 YALE LAW JOURNAL, 321, 324-325. The

It will be noted that even if the validity of the Tennessee and Missouri constitutional limitations in controversy were admitted, the Amendment would still be sustained by counting Connecticut and Vermont instead of these two states, and by disposing of the objection in the case of West Virginia as was done or in some other way.[16] In view of the not unwise requirement of the Tennessee Constitution, found also in the Florida Constitution, that the legislature which ratifies shall have been elected after the proposal of the amendment, thus preventing hasty and ill considered changes of the organic law of the land which cannot be repealed save by a further resort to the amending process, the question remains of considerable interest.

SPENDTHRIFT TRUSTS IN EQUITABLE ESTATES

In England a creditor always acquired by assignment all his debtor's rights, including any rights to payment of income from a trustee.[1] Where the latter had no discretion as to the time or mode of payment of income to A,[2] or discretion as to the time or manner, but no alternative as to the disposal of the income,[3] or a discretion to apply the income for other purposes without a power to exclude A entirely,[4] all restraints on the alienation or anticipation of A's interest were void and his assignee

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rule laid down in the cases cited is that the court cannot go behind the enrolled act and inspect the legislative journals. Both Tennessee and West Virginia follow the contrary rule. *Brewer v. Mayor* (1888) 86 Tenn. 732, 9 S. W. 166; *Price v. City of Moundsville* (1897) 43 W. Va. 523, 27 S. E. 218. Since, then, there is no officer in either of these states who has power to make a certificate of any action by the legislature which shall be conclusive upon the courts, it may be asked what the court means by "official notice to the Secretary, duly authenticated"? As to whether in considering an act of a state legislature the Supreme Court will follow the state law in regard to inspection of the journals, cf. *South Ottawa v. Perkins* (1876) 94 U. S. 260; *Walnut v. Wade* (1880) 103 U. S. 683; *Post v. Supervisors* (1881) 105 U. S. 667; *Wilkes County v. Coles* (1901) 180 U. S. 506, 21 Sup. Ct. 458; *Peters v. Braward* (1912) 222 U. S. 483, 32 Sup. Ct. 122.

[16] Cf. the disposition made of the West Virginia case by the Court of Appeals of Maryland, (1921) 114 Atl. 840, 848, holding that the legislative rule (see note 12 *supra*) providing that a question once determined must stand as the judgment of the house unless reconsidered within the two succeeding days, has no reference to a resolution coming from the other house, since the two resolutions originating in different houses do not constitute one measure. Cushing, *Law and Practice of Legislative Assemblies* (9th ed. 1874) 896. This seems to be a perfectly sound basis for upholding the West Virginia ratification.

[1] See 1 Gray, *Restraints on Alienation* (2d ed. 1895) sec. 167 j. All restraints on equitable fees in England, and generally in this country, were void. See *ibid.* secs. 105-125; *Potter v. Couch* (1891) 141 U. S. 296, 11 Sup. Ct. 1005.

[2] *Brandon v. Robinson* (1811, Ch.) 18 Ves. 429.

[3] *Green v. Spicer* (1830, Ch.) Taml. 396; *Younghusband v. Gisborne* (1844, Ch.) 1 Coll. 400.

[4] *Rippon v. Norton* (1839, Ch.) 2 Beav. 63; *Kearsley v. Woodcock* (1843, Ch.) 3 Hare, 185.